No. 13149

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Action Commenced in the United States District Court for the Eastern District of New York, Entitled

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CANADIAN AMERICAN COMPANY, INC., a corporation, *et al.*,

Defendants.

D. B. SALISBURY,

Appellant,

vs.

JOSEPH F. RUGGIERI, as Receiver,

Appellee.

On Appeal From an Order Purporting to Vacate an Order Made by the District Court at a Judicial Sale Directing That Certain Property Be Sold to Appellant D. B. Salisbury.

APPELLANT'S REPLY BRIEF.

MARVIN OSBURN,
210 West Seventh Street,
Los Anglese 14, California,
Attorney for Appellant D. B. Salisbury.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TOPICAL INDEX

PAGE

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 13149

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Action Commenced in the United States District Court for the Eastern District of New York, Entitled

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CANADIAN AMERICAN COMPANY, INC., a corporation, *et al.*,

Defendants.

D. B. SALISBURY,

Appellant,

vs.

JOSEPH F. RUGGIERI, as Receiver,

Appellee.

On Appeal From an Order Purporting to Vacate an Order Made by the District Court at a Judicial Sale Directing That Certain Property Be Sold to Appellant D. B. Salisbury.

APPELLANT'S REPLY BRIEF.

A.

Appellee Avoids the Issue: That the August 31, 1951, Order Vacating the Sale Made on August 13, 1951, to Appellant Violates the Rule—That a Subsequent Offer to Pay a Higher Price Than the Previously Accepted Bid Is Not Grounds for Setting Aside a Judicial Sale.

This appeal requests the Appellate Court to confirm the sale made to Appellant on August 13, 1951, and to vacate the August 31, 1951 order setting aside said sale. (Also the October 22 order requiring Appellant to supply

a supersedeas bond.) [Tr. p. 69.] Appellant makes this request on the grounds that the District Court violated the rule that receipt of a higher offer than the previously accepted price is not grounds for setting aside a judicial sale. Appellee's brief fails to face up to the above proposition or to any of the rules corollary thereto. Appellee's brief is a series of categorical statements in bold face type stating the converse of the propositions of law set forth in Appellant's brief, followed by assertions unsupported by authority and a conclusion comprising a recital: (1) That the price offered after the sale by Tictin was higher than the accepted bid; or (2) a reference to Tictin's attempted telephone call to the judge. This same pattern, Appellee repeatedly follows in no less than at least five instances. (Resp. Br. pars. II, III, p. 11; pars. V, VI, p. 13, and pars. VI, VIII, p. 14.)

Appellee's brief is a series of denials, unsupported by authorities for the plain reason that the converse of the propositions of law in Appellant's brief are not supported by authorities. Having made these assertions conversely to Appellant's propositions of law, Appellee is forced to rest on the assertion of Appellee's assertions.

Analysis of Appellee's brief reveals APPELLEE'S POSITION to be this: the well established rule and the rules corollary thereto—that receipt of a higher offer subsequent to acceptance of the offered price at the judicial sale is not grounds for setting aside the sale, does not apply when a stranger (Tictin) not present at the sale attempts without success on the morning of the sale and a few minutes after the judge has gone on the bench, to communicate with the judge by telephone. Connected with this position are the repeated attempts in Appellee's brief to tie in some way or some how, Tictin's attempted telephone call as being part of the sale itself and that holding the sale as and when advertised is somehow unfair to Tictin because he was not there and that it would be fair to Appellant who, pursuant to the adver-

tised invitation, was present at the sale at the time advertised and in good faith made his bid, to have the sale to Appellant set aside at the behest of Tictin—allowing Tictin to second guess Appellant by a higher offer.

Appellee's position ignores: the above rule cited, the rights acquired by Appellant at the sale, the doctrine as to the stability of judicial sales and all the rules of law quoted in Appellant's brief supported by the numerous authorities cited—to none of which Appellee's brief offers any challenge.

B.

Appellee's Brief Contains Purported Statements of Fact Not Supported by the Record or Statements Sufficiently Inaccurate to Be Misleading.

1. These statements of Appellee are not supported by the record:

> ". . . a minute order was made . . ."
>
> ". . . approving the sale." (Resp. Br. p. 3.)

The District Court did not make, as Appellee states, a "minute order" and did not "approve" anything; in this situation there was no prior sale to approve; the District Court made its own acceptance of the offer of Appellant made at the judicial sale held in open court; the sale was made and ordered by the Court itself. [Tr. p. 31.] The Court "ordered that said property be sold to D. B. Salisbury . . .". [Tr. pp. 31, 97.] As required by Federal Rule of Civil Procedure, Rule 79(a), a notation of the order made by the District Court on August 13, 1951 [Tr. p. 31], ordering the property sold to D. B. Salisbury was entered in the docket. [Tr. p. 97.]

2. This statement of Appellee is not correct:

> "Appellant filed notice of appeal from said order vacating and setting aside said minute order of August 13, 1951 . . .". (Resp. Br. p. 4.)

Appellant's Notice of Appeal states: "from the order and the whole thereof made by this Court on August 31, 1951 and dated, and filed and entered in this action August 31, 1951 vacating the order therein referred to made in this proceeding on August 13, 1951." [Tr. p. 58.]

3. This statement in Appellee's brief is not supported by the record:

> ". . . thereafter Appellee returned to Appellant, upon his demand the deposit of $6,100.00 made by him . . .". (Resp. Br. p. 3.)

This statement makes the fact appear to be that Appellant actually made demand for the deposit and this is not in accordance with the record; the matter is discussed hereinafter at length.

4. This statement in Appellee's brief may be misleading:

> "With respect to Appellant's offer to purchase said real property said offer was in writing and required him to deposit with Appellee the sum of $6,100.00." (Resp. Br. p. 4.)

This statement gives the erroneous impression that Appellant was obliged to make a $6,100.00 deposit. There is no rule or law or of this Court which requires a purchaser to make a deposit. Appellant voluntarily made the deposit.

5. The following statement in Appellee's brief may be misleading and may cast doubt in the mind of the Appellate Court as to a fact concerning which the Appellee himself should not have any doubt:

> ". . . the fact that the sale was legally published, certainly did not prevent the advertising of the property in addition to the legal advertising." (Resp. Br. p. 15.)

It was pointed out in Appellant's brief that Tictin's affidavit as to his telephone call made at such time as did not

permit him to attend the sale referred to an advertisement from which he learned the time of the sale and that the record establishes the last publication of the legal advertisements was August 2, 1951, eleven days before Tictin attempted to telephone the judge on the morning of the sale. To above suggestion made by Appellee that *other* advertisements may exist, Appellant now points out that if there were other advertisements of this sale, surely Appellee himself would know about them and it would not be necessary to suggest the *possibility* of a fact as to which the Receiver should know either is or is not an *actuality*.

6. The following statement in Appellee's brief is subject to an easily accepted erroneous impression:

> "We are not confronted with the issue alone of whether the court used discretion in setting aside an offer by reason of a larger offer being made, but have additional facts that were presented to the court upon which the court had a right to consider in exercising its discretion . . .". (Resp. Br. p. 6.)

The above statement gives the impression that there were some facts (more than one) in addition to the higher offer made after the sale to Appellant, additional to the attempted telephone call by Tictin. [Tr. pp. 78, 81.]

7. This statement in Appellee's brief is not clear:

> "It should be recognized by this Court that no formal order was ever entered with reference to the minute order made on August 13, 1951." (Resp. Br. p. 10.)

The Appellate Court is left to guess its purpose.

The facts are: This is an appeal from the August 31, 1951, order and NOT from the August 13, 1951, order; the District Court did make an order—not a "minute order" as Appellee asserts—the District Court ordered the property sold to D. B. Salisbury [Tr. p. 31]; as

required by Federal Rule of Civil Procedure 79(a) a notation of the August 13, 1951, order was entered in the docket [Tr. p. 97]; and that Appellee's counsel himself was directed by the District Court to draw a "formal order" and this Appellee's counsel promised to do [Tr. pp. 31, 77, 97], and did not do:

> ". . . The property is sold to D. B. Salisbury for $60,110. A formal order should be drawn, Mr. Silverstein and submitted for signature.
>
> Mr. Silverstein: Yes, your Honor." [Tr. p. 77.]

Apparently Appellee seeks to advantage his own omission and if that is not the object of Appellee, then why does Appellee twice refer to the "absence of a formal order" (Resp. Br. pp. 3, 10); Why refer to the August 13 order of sale at all. This is not an appeal from the August 13 order. The District Court recognized the finality of its own order made on August 13, 1951, and entered in the docket, by subsequently entertaining motions in regard thereto. Appellee himself recognized the August 13, 1951, order by motions in respect thereto.

A judgment is binding between parties although formal entry is not made.

Continental Oil v. Mulich (1934), 70 F. 2d 521.

New rules do not require formal written judgment.

Fed. Rules Civ. Proc., Rules 58, 79a;
Western Union v. De May (1939), 106 F. 2d 362.

C.

Appellee Offers No Authorities Applicable to Issues Herein in Support of Appellee's Contentions.

1. Appellee cites in all, eight decisions of which six (Resp. Br. p. 18) are valiantly offered in support of the elementary rule that an appellate court does not pass upon moot questions. Appellant is at a loss to understand why Appellee takes time here, to either mention the proposi-

tion or cite authorities in support of this unchallenged elementary general rule of law.

2. Of the remaining two decisions cited by Appellee, *Delano v. Market St. Ry.* is offered for its broad definition of "discretion" and Appellant again is left wondering why Appellee quotes this definition of considerable length because this part of the quotation (Resp. Br. p. 12) should have warned Appellee that the quoted definition did not apply to the problem herein involved:

> ". . . the power exercised by courts to determine questions *to which no strict rule of law is applicable* . . .". (Emphasis added.)

3. The other decision cited by Appellee does not support the proposition Appellee sets forth in bold face type (Resp. Br. p. 8) and under which Appellee quotes *Butterfield v. Usher.* This decision turns on the question of statutory jurisdiction as defined by the statute applicable to the District of Columbia; the decision is not relevant to the subject to vested rights acquired by a successful bidder at a judicial sale and is not authority for the contention that the order herein involved is not appealable. *Butterfield v. Usher* is misinterpreted by Appellee; the case supports and is not contrary to the position of Appellant. Appellant includes as the appendix herein a complete report of the opinion, with emphasis added.

4. Federal Rules of Civil Procedure, Rule 62(b) and Rule 73(d) and (e) do not support Appellee's contention that the District Court had authority to REQUIRE Appellant to execute a supersedeas bond. (Resp. Br. p. 7.) Appellant considered this question disposed of by the emphatic expression of The Appellate Court itself at the hearing at San Francisco November 26, 1951, on the Motion made by Appellee to dismiss these appeals.

D.

Appellee's Brief Contains Assertions Not Supported by the Record or Authorities.

1. This assertion by Appellee is not supported:

> ". . . the court has a right and it is its duty to consider such fact . . ." (that the offer of Appellant is $60,110 and that of Tictin $80,000 is of considerable difference). (Resp. Br. p. 6.)

The basis upon which the court has this asserted "right" and upon what basis the court has a "duty" to consider the difference in the bid of Appellant accepted by the court and the subsequent offer of a higher price made by Tictin Appellee leaves the Appellate Court and Appellant to guess. Appellee cites no authorities. The record establishes that this is what the District Court did do. [Tr. p. 79.] Appellant cited authorities holding that it is error for the court to consider difference in price alone or to disregard the appraised value (App. Br. pp. 17-20).

2. This statement in Appellee's brief is an unsupported assertion:

> "The District Court was only endeavoring to protect everyone's rights in the premises until the issue was determined." (Resp. Br. p. 7.)

The rights of Appellant were being taken away and ignored by setting aside the August 13, 1951, sale by the order made on August 31, 1951, and the Court and the Receiver were proceeding on the presumption that a purchaser at a judicial sale does not acquire any rights.

3. Notwithstanding Appellee's asserted assurance "that this contention of Appellee needs no amplification" (Resp. Br. p. 18) considerable "amplification" is necessary. The contention that the August 13, 1951, order is not appealable or that the August 31, 1951, order is not appealable BECAUSE the August 13, 1951, order is not

appealable (Appellee's presumption asserted), is not supported by *Butterfield v. Usher* cited by Appellee. (Resp. Br. p. 18.)

Appellant reiterates the following facts deemed pivotable to this appeal and upon which are based the Specification of Errors. (App. Br. p. 6.)

1. On August 13, 1951, the District Court itself accepted the $60,110.00 offer of, and ordered the property sold to D. B. Salisbury, Appellant herein.
2. On the morning of August 13, 1951, and after the judge had gone on the bench, Tictin attempted without success, to telephone the judge.
3. On August 15, 1951, two days after the sale made to Appellant and after the sale price was known, the affidavit of Tictin was filed, stating Tictin had intended on August 13, 1951, to make a bid. On August 15, Tictin in writing made a firm offer of $80,000.00 for the property.
4. On August 31, 1951, the District Court ordered vacated, the August 13, 1951, sale to Appellant.

The grounds and the only "grounds" upon which the District Court on August 31, 1951, ordered vacated the August 13 judicial sale made to Appellant, is disclosed by the record to be 2 and 3 above. The sale to Appellant was set aside because of the higher offer later made and the attempted telephone call to the judge. [Tr. pp. 79-81.]

E.

Appellee's Argument Comprises a Series of Statements Converse to the Issues Set Forth in Appellant's Brief; Appellee Fails to Cite Authorities Which Sustain Any of Appellee's Contentions.

Hereinafter Appellant considers Appellee's contentions in the same order as presented by Appellee:

I.

Appellee Fails to Cite Authorities Sustaining Appellee's Contentions That Appellant Did Not Acquire as the Successful Bidder at the Judicial Sale, a Vested Right of Which Appellant Cannot Be Deprived Without Cause. Butterfield v. Usher Is Misinterpreted by Appellee and Does Not Sustain Appellee's Contention.

Appellee asserts:

> "Appellant's Bid in the Proceedings Held August 13, 1951, Did Not Give the Appellant a Vested Right Recognized by Law. Neither the Appellant nor the Appellee Became Subject to an Enforceable Contract." (Resp. Br. p. 8.)

Above statement is converse to the proposition stated in Appellant's brief. (App. Br. p. 12.) Appellee ignores each and all authorities cited by Appellant. (App. Br. pp. 12-13.) Appellee cites *Butterfield v. Usher.* This decision does not sustain Appellee's contention. This case turns on the point of jurisdiction as defined by a particular statute and as the statute was interpreted by the court. This decision does not hold as Appellee contends—that an order improperly setting aside a sale, is not an appealable order. To the contrary, the Court points out that in the absence of the statute involved, the rule is that purchasers at judicial sales are regarded as having inchoate rights entitling them to take an appeal.

Because Appellee relies only upon *Butterfield v. Usher* and ignores the following authorities cited by Appellant holding that the accepted bidder at a judicial sale acquires contractual rights of which he cannot be divested without cause, the complete report of *Butterfield v. Usher* is set forth in the appendix hereto.

Blossom v. Milwaukee (1865), 3 Wall. 196, 18 L. Ed. 43;

Ballentyne v. Smith (1906), 205 U. S. 285, 289;

Camden v. Mayhew (1888), 129 U. S. 73, 9 S. Ct. 246, 32 L. Ed. 608;

See additional cases cited Appellant's Brief, pages 12-13.

II.

Appellee Fails to Offer Either Authority or Fact as to Why the Rule That Inadequacy of Price Alone Is Not Ground Upon Which to Set Aside a Judicial Sale, Does Not Apply to the Facts Herein Involved.

Appellee asserts:

"Inadequacy of Price Is a Fact to Be Considered in a Motion to Set Aside Sale Proceedings." (Resp. p. 11.)

The contention of Appellee amounts to this: Conceding that inadequacy of price alone is not grounds for setting aside a judicial sale, nevertheless, contends Appellee, if the price is inadequate then this inadequacy of price may be considered if someone attempts to telephone without success on the morning of the sale and contact the judge. Appellee's argument presumes the attempted telephone call is part of the sale and that the price offered by Appellant and accepted by the Court is inadequate. The appraisal establishes that the price is adequate. [Tr. p. 48.] Appellee does not offer authorities challenging the following authorities cited by Appellant.

In re Burr Mfg. & Supply Co. (1914), 2 Cir. 217 Fed. 16, 21;

In re Metallic Specialty Mfg. Co. (1912), 3 Cir. 193 Fed. 300;

See additional authorities cited, Appellant's Brief, page 14.

III.

Appellee Fails to Challenge Application of the Rule of Law Quoted by Appellant: Judicial Sales Will Not Be Set Aside Unless: (a) There Was Fraud, Unfairness or Mistake in the Conduct of the Sale; or (b) the Price Brought at the Sale Was So Grossly Inadequate as to Shock the Conscience of the Court and Raise a Presumption of Fraud, Unfairness or Mistake.

Appellee asserts:

> "Judicial Sales Will Be Set Aside Where Unfairness Is Apparent or There Was a Mistake in the Conduct of the Sale." (Resp. Br. p. 11.)

Why consume time of the Appellate Court or Appellant by asserting in bold face type, this unquestioned postulate if not shown to be applicable to the facts involved or no bona fide attempt is made to show application of the rule. Appellee does not point out or make any attempt to point out (1) unfairness (apparent or otherwise) or (2) mistake, IN THE CONDUCT of the sale.

Following the above, Appellee follows Appellee's pattern followed throughout his reply brief: Assert: (1) reference to the increased offer made after the sale; and (2) the attempt of Tictin to telephone the judge.

Appellee ignores the working rules and illustrations offered to determine unfairness IN THE CONDUCT of the sale, quoted in the following decisions:

> *Guaranty Trust Co. of N. Y. v. Williamsport Wire Rope Co.* (1937), 2 Cir., 20 Fed. Supp. 634, 640;

See additional citations (App. Br., pp. 15-16).

IV.

Appellee Avoids the Rule Quoted in Appellant's Brief: "Finding That the Price Bid Is Inadequate Because of the Difference Between the Accepted Price Bid and a Subsequent Higher Offer Is an Abuse of Discretion. In Determining Adequacy of the Price the Court Must Consider Appraisement of the Property as a Guide in the Exercise of Its Discretion."

In response to the above rules of law advanced by Appellant (App. Br. p. 17), Appellee asserts:

> "There Was No Abuse of Discretion in Ordering the Sale Proceedings Set Aside." (Resp. Br. p. 12.)

Appellee's assertion is directed to the above rule quoted in Appellant's brief and in avoidance of authorities cited by Appellant (App. Br. pp. 17-18) offering illustrations and the rule as to appraisement to consider in determining inadequacy of price. Appellee cites *Delano v. Market St. Ry. Co.,* quoting therefrom a broad definition of "discretion" which, as heretofore pointed out, should have been sufficient to warn Appellee that the broad definition quoted does not apply to the facts involved herein because this broad definition of discretion applies when no strict rule of law is available. On this subject Appellant cites the rules supported by numerous authorities that the court should consider: (a) whether or not the price is so grossly inadequate as to shock the conscience of the court so as to raise a presumption of fraud or unfairness; (b) that the court is not permitted to consider merely the difference between the accepted bid and a higher offer later made; and (c) it is abuse of discretion if the court does not consider the appraised value. In the instant situation the appraised value approximated Appellant's bid acccepted by the court [Tr. p. 48], and the record establishes that the District Court considered as grounds for

setting aside the sale made on August 13, 1951, the difference between the accepted bid price and the subsequently made higher offer. [Tr. p. 79.] The District Court did the very thing denounced by the above rules of law supported by the authorities cited by Appellant and which Appellee does not mention. The Court looked at the comparison in the bid price and the subsequent offer made and ignored the appraisal. The District Court did this:

> "In speaking of a price which is grossly inadequate, the courts are referring to the value of the property and not the differences in the price bid. But the court may look at the difference in the bids to determine the value of the property." [Tr. p. 79.]

In lieu of Appellee's asserted assurance that "There was no abuse of discretion . . ." Appellant offers the above quoted rules of law as to what is an abuse of discretion upheld by:

In re Stanley Engineering Corp. (1947), 3 Cir., 164 F. 2d 316;

Jacobson v. Larkey (1917), 245 Fed. 538.

V.

Appellee Avoids the Rule Quoted by Appellant: A Subsequent Offer to Pay More Than the Price Previously Bid and Accepted Is Not Ground for Setting Aside a Judicial Sale and Depriving the Accepted Bidder of His Rights.

Appellee asserts:

> "A Subsequent Offer to Pay More Than the Price Previously Bid Should Be Considered on Motion to Set Aside a Sale Proceeding." (Resp. Br. p. 13.)

Appellee makes no attempt to support his assertion, announces that Appellee "recognizes the rule with reference to setting aside judicial sales" and follows Appellee's

pattern followed throughout his reply brief: assert the converse of Appellant's proposition and close with: (1) assert the increased offer made after the sale; and (2) refer to Tictin's attempted telephone call to the judge and thus ignore Appellant's authorities:

In re Stanley Engineering Corp. (1947), *supra;*

Jacobson v. Larkey, supra;

Knight v. Wertheim & Co., 2 Cir. (1946), 158 F. 2d 838.

VI.

Appellee Avoids: The Rule of Law Quoted by Appellant: Setting Aside a Judicial Sale in the Absence of Fraud, Unfairness or Mistake in the Conduct of the Sale or a Sale at a Price so Grossly Inadequate as to Shock the Conscience of the Court and Raise a Presumption of Fraud, Unfairness or Mistake Is an Abuse in Exercise of Legal Discretion, and Reversible Error.

Appellee asserts:

"Setting Aside a Judicial Sale Must Be Governed by the Facts in Each Individual Case." (Resp. Br. p. 13.)

Appellant concedes the facts in every case must determine the rule applicable.

Appellee contends *In re Stanley Engineering Corp., supra,* cited by Appellant, "determined only the issue of the increase of the bid" (Resp. Br. p. 13); Appellee then refers to Tictin's telephone call as though it were part of the sale itself.

Appellee's statement that, in the *Stanley* case, only the issue of the difference between the bid and subsequent offer was considered (Resp. Br. p. 13) is not the fact. The *Stanley* case plainly holds that it is reversible error

to consider only the difference between the accepted bid and the higher offer made later. Herein an appraisal had been made and in the *Stanley* case an appraisal was considered:

> "In determining whether gross inadequacy exists the bankruptcy court must take into consideration appraisement of the property as a guide in the exercise of its discretion . . ." (P. 318.)
>
> *In re Stanley Engineering Corp., supra.*

In the instant situation, the District Court did what is denounced in the *Stanley* case: ignored the appraisal and considered difference between the accepted bid and the higher offer made two days later. [Tr. p. 79.]

VII.

Appellee Makes No Attempt to Meet the Cited Authorities Which Distinguish Between Sales Subject to Confirmation and Sales Made by the Court Itself Requiring in the Latter Situation the Same Grounds Required to Set Aside Sales Between Individuals.

Appellee asserts:

> "The Authorities Were Correctly Applied by the Court in Setting Aside the Sale Proceedings." (Resp. Br. p. 14.)

In support of this assertion, Appellee offers this:

> "We do not believe the Court's discretion should be disturbed in this matter." (Resp. Br. p. 14.)

Notwithstanding this assurance, in support of the above rule Appellant offers the following citations ignored by Appellee:

> *In the Matter of the Burr Mfg. Co.* (1914), 2 Cir., 217 Fed. 16;
>
> *Sturgiss v. Corbin* (1905), 4 Cir., 141 Fed. 1.

VIII.

The Court Should Not Have Considered the Attempt Without Success to Telephone the Judge on the Morning of the Sale in Vacating the Sale Previously Made to Appellant.

Appellee asserts:

> "The Court Properly Considered the Attempts of a Prospective Purchaser to Present His Better Bid in Determining the Motion to Set Aside the Sale Proceedings." (Resp. Br. p. 14.)

It was the Court's duty to consider all "bids" but Tictin to whom Appellee refers as though Tictin made a "bid" did not make a "bid." Tictin made a firm offer for the first time two days after the sale and when the accepted bid price of Appellant was known.

If judicial sales are to be set aside because of last minute unsuccessful telephone calls, then those decisions cited in Appellant's brief, ignored by Appellee, must be set aside. Appellant refers to the rules quoted to the effect: the buyer at a judicial sale acquires a vested right; the Court is as firmly bound in law and morals as any private citizen by his own executed sale; the circumstances must raise a presumption of fraud or unfairness; and courts will not refuse to confirm a sale merely to protect someone against the results of his own negligence.

IX.

Appellee Does Not Offer Any Authorities Contrary to Those Cited by Appellant in Support of Appellant's Statement: That the Order Made August 31, 1951, and the Order Made October 25, 1951, Are Appealable Orders.

Appellant does not desire to add anything to that which is said in support of the above proposition in Appellant's brief (App. Br. pp. 24-25) and respectfully directs the

attention of the Appellate Court to the cases therein cited. In addition to the reference to the order made on October 25, 1951, requiring Appellant to furnish a *supersedeas* bond, Appellant directs the attention of the Court to the other provision in said order providing that unless said *supersedeas* bond is supplied by Appellant, the sale will be held, etc.

Butterfield v. Usher cited here by Appellee does not sustain the contention of Appellee that the orders are not appealable and to the contrary, upholds the rule set forth in Appellant's brief sustained by authorities cited, that an order when it is a final determination of the rights of a purchaser at a judicial sale, is an appealable order.

X.

Appellee's Contention That the Order Entered August 31, 1951, Is Not Appealable Because the Order Made August 13, 1951, Is Not Appealable, Is Not Supported by Law or the Citation Given by Appellee.

Notwithstanding Appellee's assurance "this contention of Appellee needs no amplification," the above assertions certainly do need amplification. First, let it be noted that *Butterfield v. Usher* cited by Appellee does not support any of the contentions Appellee above makes and as heretofore pointed out, this case has been misread by Appellee.

It is pointless for Appellee to assert here that the August 13, 1951, order is not appealable. This is not an appeal from the August 13, 1951, order. The appeal here is taken from the August 31, 1951, order and also the October 22nd order.

Whether or not the August 31, 1951, order is appealable is not dependent on whether or not the August 13, 1951, order is appealable.

In re Schulte-United (1932), 59 F. 2d 553.

The August 31, 1951, order is appealable because as to Appellant it is a final determination of the rights of Appellant and if allowed to stand puts an end to the proceeding as to the rights acquired by Appellant as the accepted bidder.

U. S. C. A., Title 28, Sec. 1291;
Federal Rules of Civil Procedure, 54(a);
American Brake Shoe Foundry Co. v. N. Y. Rys. Co. (1922), 2 Cir., 282 Fed. 523;
Sikeman, et al. v. Jewel Gold Mining Co., et al. (1924), 2 Cir., 2 F. 2d 665;
McKinnon v. American Agar Co. (1934), 9 Cir., 73 F. 2d 835;
Sturgiss v. Corbin, supra.

F.

Appellee's Contention That the Cause for Appeal Is Moot Because Title Was Not Conveyed Prior to Close of August 31, 1951, Is Not Supported by Law or Fact. Appellee's Claim That Appellant Demanded Return of the Deposit Is Not the Fact.

Appellee, repeatedly throughout his brief, contended that Appellant had not acquired vested rights at the judicial sale held August 13, 1951; now in furtherance of Appellee's scraping around to bolster his contention that the appeal has become moot, Appellee admits Appellant did acquire rights by asserting in bold face type "All rights and obligations of Appellant to Appellee and of Appellee to Appellant expired." (Resp. Br. p. 16.)

Appellee's contention presumes the provision in Appellant's letter was intended for the benefit of Appellee and not for the benefit of Appellant.

Appellee presumes without support of facts in the record: that the provision as to the availability of the documents of title is a condition subsequent terminating the agreement as to the sale itself; that this condition

for the benefit of Appellant, could not be waived by Appellant: and that the agreement provided that time was of the essence.

Appellee overlooks: that it was the Appellee who on August 16, 1951, made a motion to set aside the sale made to Appellant; that the motion of Appellee to set aside the sale to Appellant was heard on August 26, 1951, taken under advisement and that the District Court on August 30, 1951, announced its decision [Tr. p. 78] and the elementary rule of law that one cannot advantage to himself his failure to perform a contract condition. Does Appellee infer that it lay within Appellant's power to acquire the documents prior to August 31, 1951, and that Appellee having moved to vacate the sale and the Court having ordered the sale vacated, that Appellee would have delivered the documents on demand?

This statement of Appellee is not supported by the record:

> ". . . thereafter Appellee returned to Appellant, upon his demand the deposit of $6,110 made by him . . .". (Resp. Br. p. 3.)

Appellee's assertion makes the fact appear to be: that Appellant actually did demand return of the deposit; that Appellee Receiver returned the deposit because Appellant demanded the deposit. Appellant did not demand return of the $6,100 deposit; Appellee returned the deposit to Appellant because the Court ordered its return [Tr. p. 48] and without demand from Appellant.

The record does not support Appellee's assertion: (1) on August 31, 1951, the District Court made an order ". . . (5) that the Receiver shall return to D. B. Salisbury the sum of $6,100 heretofore deposited with the receiver by said D. B. Salisbury . . ." [Tr. p. 48]; (2) to bolster Appellee's assertion that Appellee demanded return of his deposit, Appellee on page 3 of his brief

refers to page 67 of the transcript and page 67 of the transcript is a copy of Appellee counsel's affidavit—Leo V. Silverstein, asserting "That on the 4th day of September, 1951, the receiver returned to D. B. Salisbury upon his demand the sum of $6,110 . . .". [Tr. p. 67.] Even this is not a statement of fact but is made in the form of a conclusion. The ultimate fact as to when, where, to whom or how Appellant "demanded" return of his deposit is not stated any place in the record; (3) before the Court made the order vacating the August 13. 1951, order making the sale to Appellant, Appellee's counsel announced on **August 30, 1951,** "we have the check to return" [Tr. p. 85]; (4) on **September 4th** Appellee sent Appellant a check dated August 9, 1951, payable to D. B. Salisbury in the sum of $6,110 (see Motion of Appellee to Dismiss Appeals, affidavit of Leo V. Silverstein attached). (See Motion to Dismiss by Appellee accompanied by Affidavit of Leo V. Silverstein the Motion being dated November 9, 1951, the affidavit including a photostat of the check dated August 9, 1951.)

Neither the law nor any rule of the District Court requires the purchaser at a judicial sale to make a deposit; Appellant herein made the deposit voluntarily.

It ought not be necessary to here point out that the colloquy with counsel as quoted on page 17 of Appellee's brief refers to events occurring after the Court had announced its decision and that counsel himself said he could not state the position of his client. Appellee reads into the colloquy a meaning obviously not intended. If Appellee were correct, this colloquy as of that date would not be material to the issues herein. The August 31, 1951, order directed return of the deposit and the order is the reason Appellee returned the deposit on September 4th.

Respectfully submitted,

MARVIN OSBURN,

Attorney for Appellant D. B. Salisbury.

APPENDIX.

Butterfield v. Usher, 91 U. S. (1875) 246.

Where the Supreme Court of the District of Columbia, at the general term thereof, rendered a decree vacating and setting aside a judicial sale of lands which had been confirmed by an order of the special term of said court, and directing a resale of them, *Held,* that the decree was not final, and that no appeal would lie therefrom to this court. [Headnote.]

Appeal from the Supreme Court of the District of Columbia.

On the 7th June, 1872, a decree was rendered by the Supreme Court of the District of Columbia in a suit in equity between Horace S. Johnston, plaintiff, and George Usher, defendant, directing a sale of certain lands, the property of Usher. In pursuance of this decree, a sale of the property was made to John W. Butterfield on the 30th of September. This sale was reported to the court Oct. 16; and on the 15th November and order of confirmation was entered, unless cause to the contrary should be shown on or before Dec. 10. Cause was not shown by the time limited; and thereupon, on the 12th December, Butterfield paid the amount of his bid to the trustee who made the sale, and receive from him a deed of the property. Previous to this time, there had been no order of the court directing a conveyance; but on that day the trustee reported to the court that he had received the purchase-money, and executed the deed; and thereupon an order was entered, ratifying and confirming the sale and approving the deed. This deed was left for record in the land records of the District on the day of its execution.

On the 14th December, and during the same term of the court, the order of Dec. 12 was set aside on the petition of Usher, and leave granted him until Dec. 21 to show cause against the confirmation. At the appointed time he did appear, and made his showing; but on the 25th January an order of confirmation was again entered. From this order Usher appealed to the general term, where, on the 7th June, the following decree was entered:

"Upon the offer of the defendant making an advance on the sale heretofore made, it is ordered, adjudged, and decreed by the court, this seventh day of June, A. D. 1873, that the sale heretofore made in this cause by Francis Miller, Esq., trustee, be, and the same is hereby, vacated and set aside. And it is further ordered that the said trustee may proceed to advertise and resell the property, and that the expenses of the cause heretofore incurred may be paid out of the proceeds to be realized from the sale hereby directed to be made. And it is further ordered that the money in the hands of the trustee be paid back to the purchaser, with interest thereon at the rate of ten per cent per annum, to be paid by the defendant Usher, and to be deducted by the trustee from the proceeds to come into his hands from the further sale hereby ordered. And it is further ordered that the trustee, in reselling the property, put up the same at a price not lower than the sum realized at the former sale, together with the sum of five hundred dollars advance offered by George W. Mauptman."

From this decree Butterfield has taken this appeal. He alone appears as appellant, and Usher alone as appellee.

An appeal lies to this court from the *final* decree of the Supreme Court of the District of Columbia in any case where the matter in dispute exceeds the sum of one thousand dollars. Rev. Stat. sect. 705.

"In case of the sale of things, real or personal, under a decree in equity, the decree confirming the sale shall divest the right, title, or interest sold, out of the former owner, party to the suit, and vest it in the purchaser, without any conveyance by the officer or agent of the court conducting the sale; and the decree shall be notice to all the world of this transfer of title when a copy thereof shall be registered among the land records of the district; but the court may, nevertheless, order its officer or agent to make a conveyance, if that mode be deemed preferable in particular cases." Rev. Stat. relating to the Dis. of Col., sect. 793.

Mr. Enoch Totten for the appellant, and Mr. Richard T. Merrick for the appellee.

Mr. Chief Justice Waite delivered the opinion of the court.

The decree here appealed from disposed finally of a motion made in the case, but not of the case itself. It simply set aside one sale that had been made, and ordered another. A decree confirming the sale would have been final. But this decree is analogous to a reversal with directions for a new trial or a new hearing, which, as has often been held, is not final. **Where the practice allows appeals from interlocutory decrees, and appeal might lie from such a decree as this.** Such was the practice, in New York, 2 Rev. Stat. (N. Y.) 605, sects. 78, 79; id. 178, sects. 59, 62. Consequently it was said, in Deleplaine v Lawrence, 10 Paige, 604, *"In sales by masters, under decrees and orders of this court, the purchasers who have bid off the property and paid their deposits in good faith are considered as having inchoate rights, which entitle them to a hearing upon the question whether the sales shall be set aside; and, if the court errs*

by setting aside the sale improperly, they have the right to carry the question by appeal to a higher tribunal." **But our jurisdiction upon appeal is statutory only.** If some act of Congress does not authorize a case to be brought here, we cannot take jurisdiction. **Appeals cannot be taken to this court from the Supreme Court of the District, except after a final decree in the case by that court.** The decree in this case not being final, we have no jurisdiction.

We do not wish to be understood as holding that a purchaser at a sale under a decree in equity may not, at proper stage of the case, appeal from a decree affecting his interests. All we do decide is, that there cannot be such an appeal to this court until the proceedings for the sale under the original decree are ended.

In *Blossom v. R. R. Co.,* 1 Wall. 655, and 3 id. 196, we entertained such an appeal; but the decree there appealed from was final. There was no order to resell, for the reason, that, between the time of Blossom's bid and the time of the order of the court appealed from, the decree for the satisfaction of which the sale had been ordered was paid. The decree against Blossom, therefore, was the last which the court could make in the case. It ended the proceedings, and dismissed the parties from further attendance upon the court for any purpose connected with that action.

This appeal is, therefore, dismissed for want of jurisdiction. (Emphasis added.)